No. 22272

In the

United States Court of Appeals

For the Ninth Circuit

KAISER STEEL CORPORATION,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the Judgment of the United States District Court for the Northern District of California.

Appellant's Reply Brief

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I. INTRODUCTION

The difficulty in preparing a reply brief in this case does not lie in answering the points which are raised in the Government's brief. Rather it is in synthesizing the relevant issues in the case to which a reply properly should be directed and in refocusing the Court's attention upon the clear legal errors in the decision of the lower Court.

II. NATURE OF THE SIGNIFICANT ERRORS OF THE DISTRICT COURT

The Government seeks refuge in the claim that the significant questions involved are solely ones of "fact" and that the District Court has carefully weighed "voluminous evidence" which adequately supports its findings of fact. Since the findings of "fact"

are not clearly erroneous, says the Government, there is nothing really for this Court to do.

The case does involve a voluminous amount of evidence. With scarcely any exceptions, however, this consists of agreed upon facts or of facts which are not in any way controverted in the record. The real issues lie, then, in the fact that the District Court, having before it a set of largely undisputed facts, either misapplied or failed to apply proper legal standards.

To the extent that the District Court drew from the undisputed underlying facts inferences which are, in truth, inferences of fact, it is amply demonstrated that such factual conclusions are clearly erroneous under the classical standard for appellate review. However, by and large, resort to this test is not necessary.

The central issue in this case is the determination of the representative field or market price of the mineral products mined by Kaiser. This determination involves the application of legal standards. In *U. S. v. Henderson Clay Products,* 324 F.2d 7 (5th Cir. 1963) the taxpayer was an integrated clay miner-brick manufacturer who sold none of its clay at any stage prior to the finished brick product. To establish the taxpayer's gross income from its clay mining operations, the District Court determined the representative market price of taxpayer's clay by reference to sales of similar clay in other parts of the United States by non-integrated miners. The Court found the average price of these sales to be $10.50 per ton and calculated taxpayer's depletion allowance accordingly. 199 F. Supp. 304. The Fifth Circuit Court of Appeals reversed, but not because it found anything wrong with the lower Court's factual findings as to the price at which non-integrated miners were selling their clay during the tax years in question. Rather, the Court of Appeals found that the sales relied upon by the District Court were not "representative" of the value of the taxpayer's clay. 324 F.2d at 15. The Court of Appeals noted that "representative market or field price is not a boiler plate . . ." and stated:

> "The Regulation does not allow the indiscriminate use of any price of a product of like kind and grade, but requires the price to be representative; 'representative' should be

> interpreted to qualify the entire phrase 'market or field price'." (324 F.2d at 14).

Thus the Fifth Circuit dealt with the ultimate finding of a representative market price as a classic question of law—the application of the legal standard "representative" to the basic evidentiary facts determined by the District Court.

In *Kippen v. American Automatic Typewriter Co.*, 324 F.2d 742 (9th Cir. 1963), the question to be decided was whether the defendant had "good cause" to terminate one of its distributor's contracts. The District Court found on the basis of the facts that "good cause" existed. The Court of Appeals reversed, noting specifically that it was not bound by the "clearly erroneous" rule as to the finding of good cause. The Court observed (324 F.2d at 745): "The conclusion that American therefore had 'good cause' to discharge Kippen was a conclusion of law, since it was based at least in part upon the application of a legal standard." Further, the Court noted:

> "In Lundgren v. Freeman, 9 Cir., 307 F.2d 104, 115, we defined a conclusion of law as one 'based on application of legal standard'. Similarly, in Galena Oaks Corp. v. Scofield, 5 Cir., 218 F.2d 217, 219, it was stated that insofar 'as the so-called ultimate fact is simply the result reached by the processes of legal reasoning from, or the interpretation of the legal significance of, the evidentiary facts, it is subject to review free of the restraining impact of the so-called clearly erroneous rule."

The foregoing is particularly applicable where, as here, the findings deal with the effect of a series of transactions or events. In such circumstances the Appellate Court is free to draw its own conclusions. *Stevenot v. Norberg*, 210 F.2d 615, 619 (9th Cir. 1954).

Here the decision of the District Court rests upon the misapplication of the legal standard of "representative" market price in many instances and a complete failure by the District Court in other instances to apply the proper legal standards which that Court itself concluded were applicable.

A. Use of Any Price as a "Representative" Price.

One of the more obvious errors has to do with the District Court's interpretation of a "representative" market or field price. The ultimate issue is to determine Kaiser's "gross income from the property" for depletion purposes. If the product involved is sold, then, of course, the gross income from the property is the amount for which such product was sold. But if the product is transported or processed (Kaiser's products were both) and used by an intergrated producer, then in order to establish "gross income from the property" it is necessary, according to the regulations*, to use the *representative* market or field price of a mineral product of like kind and grade. The Government urges here (brief p. 29) the same view which was adopted by the District Court, namely, the position that *any* transaction by others establishes a market price because that particular transaction is "representative" of the market in which the transaction occurred. To adopt such a position is to render meaningless the term "representative". The legal standard that the transaction must be "representative" is fixed by law and the regulations. To repeat the language in *U. S. v. Henderson Clay Products, supra,* 324 F.2d at 14:

> "The Regulation does not allow the indiscriminate use of any price of a product of like kind and grade, but requires the price to be representative; 'representative' should be interpreted to qualify the entire phase 'market or field price'."

The cases have held, without exception, that the legal standard requiring the price to be "representative" must be applied in looking at the facts of any particular transaction to determine whether or not it is such a transaction as can reliably be included in establishing a "representative" market price. If not, the transaction must be rejected. For example, in *U. S. v. Cannelton Sewer Pipe Co.,* 364 U.S. 76, 78 it was found that certain sales of ground and bagged fire clay and shale were too negligible to furnish an "appropriate basis". In *Alabama By-Products Corp. v.*

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*Section 29.23(m)-1, Regulations 111, Appendix C, Kaiser brief.

Patterson, 258 F.2d 892, 899 (5th Cir. 1958) certain sales resulting from "peculiar economic conditions" were rejected as a basis establishing a "representative" market price. In *North Carolina Granite Corp.,* 43 T.C. 149 (1964) the taxpayer produced a certain high grade granite which commanded a price of around $9 a ton when sold for use as poultry grit. The same material also could be sold for roadbuilding material at around $1 per ton. The Commissioner argued that the latter figure was the proper one to use for depletion purposes, but this argument was rejected. The Tax Court said the prices of the material for roadbuilding purposes "were not representative of the value of the product to the poultry industry." (43 T.C. at 161).

Numerous other cases cited on pages 20 to 23 of Kaiser's brief clearly uphold the rule that not *every* price at which a particular transaction occurs is a "representative" price. The Government cites no authority to the contrary and, indeed, in its brief does not comment at all upon these important authorities.

The case of *Woodville Lime Products Company v. U.S.,* 263 F.Supp. 311 (N.D. Ohio 1966) is another clear example of the rule that not every price is a "representative price" and that the legal standard of "representativeness" must be met. In this case the Court stated at page 321:

> "Ordinarily one might presume that actual sales would furnish a proper basis for determining a constructive price for unsold materials. However, as this case makes clear, the *nature of the market in which those sales occurred* must be explored before any *conclusion* can be drawn regarding the 'representativeness' of actual sales." (Emphasis added)

Even the Government recognizes the fundamental correctness of this position for, in an unguarded moment, the Government observes "distress sales at sacrifice prices are unlikely to be representative or typical market prices" (Government brief, p. 34). The Commissioner, in his 1966 proposed regulations*, provides

*Appendix E, Kaiser Brief, p. 20. The proposed regulations are "strongly persuasive of the Commissioner's view of the proper construction of the statute." *Henderson Clay Products v. U.S.,* 377 F.2d 349, 354 (5th Cir. 1967).

for the use in determining representative market only of sales which "are the result of competitive transactions." For the purpose of determining representative market or field price "exceptional, nominal, unusual, tie-in, or accommodation sales shall be disregarded."

A clear example appears with respect to the sale of iron ore. The uncontradicted testimony in this case is that fine ore is not suitable for use in the blast furnace. The Court found that "Physical . . . differences have importance if they are recognized in commercial competition" (Conclusion 6, R. 52). Utah Construction Company built up a large stockpile of fine ore as the residue of other shipments over a considerable period of time. In 1950 a large volume of this undesirable ore was unloaded on Geneva Steel Company in a special transaction at a very low price. This transaction, at a price which was quite obviously dictated by the distress nature of the merchandise, is nonetheless included in the representative transactions used to establish the price for Kaiser's iron ore*. The inclusion of this sale results from the application of an erroneous legal standard by the District Court as to what transactions are "representative" transactions†.

The Government (brief p. 30) cites *Riverton Lime & Stone Co.*, 28 T.C. 446 (1957) for the proposition that even a small declining market can establish a representative price, but in that case the Court did not close its eyes to surrounding circumstances. Indeed, there the Government was arguing that depletion should have been determined from computed prices derived on the basis of selling the taxpayer's limestone in its quarried state for agricultural purposes. The Court rejected this contention on the strength of its finding that the taxpayer did not sell for this purpose because of an abundance of other limestone in the area which was more suited

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*District Court Finding No. 22, R. 37.

†The complete inconsistency followed in applying this standard is illustrated by the Court's Finding No. 63 (R. 47) to the effect that prices for different coals cannot be used unless they are a "complete substitute" one for the other, since they are not of like kind and grade. Using this criteria it is obvious that these "fines" cannot be representative of Kaiser's ore.

to agricultural use. In fact, the Court in *Riverton* even examined the question of suitability for a particular use in determining the representative nature of sales or potential sales in a particular market.

On the other hand, in the instant case the District Court was persuaded by the Government's argument that any transaction is a "representative transaction" because the price at which that transaction took place is "representative" of the transaction which occurred. It was in failing to give consideration to the facts surrounding the particular transaction (which facts were largely undisputed in this record), for the purpose of applying the legal standards as to what is a "representative" price that the Court is in error.

Not only did the Court err in establishing a market price for depletion purposes by *including* transactions which do not meet the test of being "representative" — it compounded this error by excluding the only transactions which were truly "representative." The most startling example is the exclusion of the Raton coking coal prices. The Court found as an evidentiary fact that "The Raton-Mesa coal and the Sunnyside coal of the plaintiff competed directly in the market place, were both suitable for production of coke when blended with low volatile coal and were similarly utilized . . ." (Finding 70, R. 50). When it came to establishing a representative market price the Court, however, completely failed to include any of the sales of Raton-Mesa coal. This is clearly apparent from Exhibit XX, which is the basis of the Court's Finding 52 (R. 45) in which it determines the representative market price for coking coal.

B. Failure to Make Price Adjustments Recognized in the Market.

Another erroneous application of legal standards by the District Court and supported by the Government here is the proposition that once a transaction "price" has been determined, there can be no adjustments for "value"; and the Government belabors at length the point that market price and market value are different concepts. Again, however, the Government sidesteps the funda-

mental issue. For if it is shown, as it was demonstrated by the uncontroverted evidence in this case, that products with differing qualities command differing prices in the market place because of those qualities, then a comparison of those products for the purpose of establishing a "representative" market price must take into account the pricing differences *which the market itself would consider*. To call differences in price which the market place would attach, were a product to be sold in the market, a "value" adjustment is a mere exercise in semantics.

A clear example of such error occurred with respect to the comparison of the Sunnyside and the Raton coal. The Sunnyside coal was a washed coal and it also had a lower ash content than the Raton coal. The evidence established beyond doubt that if the two coals were to be sold in the market place, commercial competition would cause the market price to be higher for the Sunnyside coal to reflect the fact of the washing and also the fact that the Sunnyside coal had a lower ash content. However, in comparing these two coals, the District Court chose to ignore these pricing factors, despite the overwhelming evidence that they were recognized in the market place.

In the regulations which he proposed in 1956* (later withdrawn and modified) the Commissioner was not oblivious of the price adjustments made by businessmen in the market place for he provided that in making price comparisons there should be "proper adjustments" for "material differences, if any, between the taxpayer's gross income product and the products sold commercially."

The greatest anomaly of the situation lies in the fact that the Court recognized the standard in its Conclusion of Law No. 6. "Minerals are like kind and grade if they are substantially equivalent by commercial standards. Physical, chemical or geological differences have importance only if they are recognized in commercial competition." (R. 52). It simply failed to follow the standard.

It should be borne in mind that the market "price" for Kaiser's coal and iron ore can never be determined with absolute certainty.

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*Appendix D, Kaiser brief, pp. 9-10.

The reason is that Kaiser did not sell its iron ore or coal, but rather used these minerals in the production of iron and steel. Therefore, the best that can ever be done is to attempt to arrive at the price at which these products would have been sold, had they been sold by an independent operator of the Sunnyside coal mine and the Eagle Mountain ore mine. This price must by definition be a hypothetical price and not an actual price. In this hypothetical transaction (which did not in fact occur) it cannot be assumed that the hypothetical seller was willing to sell the product for anything less than it was "worth" in the sense of what it would command in the market, or that the hypothetical buyer would pay anything more than the product was "worth". Therefore, whether the result we are attempting to determine is called a hypothetical sale "price" or a hypothetical "value" is a distinction without a difference.*

Although the District Court seemed to realize that what we are trying to do is to "estimate that part of the integrated producer's gross income that is attributable to mining" (Conclusion of Law No. 9, R. 54) it makes the remarkable statement that "opinions and estimates of what buyers could have paid or should have paid for that mineral are entirely irrelevant." (Conclusion of Law No. 7, R. 52). The fact is, that so far as the integrated miner-manufacturer who uses his own product is concerned, no actual sales transaction ever occurs. All the trier of fact can ever do in such cases is to apply the legal standard of "representative" market price and make its opinion and estimate of the price which the integrated operator could have paid or should have paid for the mineral in question. Far from being "irrelevant", this is the

*The Government (brief p. 29) relies on *Shamrock Oil & Gas Corp. v. Coffee,* 140 F.2d 409 (5th Cir. 1944) which involved the determination of a "market price" for sour gas at the well. The court held that if there were sales which were "comparable and under terms and conditions similar to the terms and conditions involved in the contract under consideration" such sales should be used. (140 F.2d at 411) However, the court further noted that *in the absence* of comparable sales under similar terms and conditions, value "could be shown by opinion evidence in an effort to fix market price" and, in such a situation, the terms market price and market value are "interchangeable."

central issue to be determined. In making such determination the trier of fact not only can, but must, consider whether other transactions to be examined are, on their facts, truly representative and whether the prices at which such other transactions occurred would, as in the instant circumstances, require adjustment because of pricing factors recognized in the market place.

C. Failure to Adjust for Freight.

A further and very obvious failure to apply correct legal standards was made by the District Court with respect to the treatment of freight on iron ore. Under the applicable regulations depletion is computed upon the basis of the gross income from the property. The property referred to is the taxpayer's mine and not the mine of some other mineral producer. The taxpayer "is deemed to sell to himself the crude mineral product *he* mines." (Conclusion of Law No. 9, R. 53). He mines the product from *his mine.* The test is clearly enunciated in the *Cannelton* case (page 27 of the Government's brief) wherein it is observed that the cutoff point is "where the ordinary miner shipped the product of *his* mine" (Emphasis added). Reverting again to the Commissioner's 1956 proposed Regulations* we find that the price to be determined is the price "at which the gross income product is sold commercially *in the vicinity of the taxpayer's mine.*" (Emphasis added). Absent such sales, we must determine the price at which the "gross income product would be sold if such commercial sales existed" (i.e., sales made at the locus of the taxpayer's mine).

The Court rejected the taxpayer's contention that prices established in the only recognized United States ore market at the Lower Lake ports should be used. Instead, the Court used prices of ore sales by Utah Construction Company. It is undisputed that there were no significant sales at the taxpayer's mine or from any mine in the vicinity thereof (and the Utah Construction Company mine in Carbon County, Utah, is certainly not in the vicinity of San Bernardino County, California). Assuming, *arguendo,* that

*Appendix D, Kaiser brief, p. 9.

the Court's determination was correct, then a representative market price must be determined at some point where a representative market in which the taxpayer could sell is found to exist, and the price at the taxpayer's mine can only be determined by subtracting from that market price the freight from the taxpayer's mine to that market. In the instant case this means using the export ore prices at Long Beach and subtracting from this price the freight from Kaiser's mine to Long Beach. A failure to make such a determination, as the District Court fails to do in this case, is clear error. The Government's own witness, Dr. Jones, testified that that was the way to do it (Tr. 859, lines 9-13).

We submit, therefore, that the question is not whether the determination by the District Court of the underlying facts is clearly erroneous, but rather, on the basis of those facts, whether the District Court failed to properly apply legal standards. We say it did not. With this in mind, we turn to a more detailed examination of positions advanced by the Government's brief.

III. IRON ORE

A. Representative Market Price.

Kaiser has reviewed in detail in its opening brief (pp. 7-10, 28-33) the circumstances surrounding the sales of iron ore by Utah Construction Company and has set forth the compelling reasons why such transactions do not meet the test of a "representative" market price. The impropriety of using the sale of 422,913 net tons of undesirable fine ore to Geneva Steel Company in the fiscal year ending October 31, 1950, already has been discussed. (supra p. 6) This sale accounted for more than 50% of the total sales of Utah Construction Company for that fiscal period. Apart from this distress sale, the export sales and the sales to Kaiser itself, the dealings of Utah Construction Company in iron ore during the periods in question were insignificant in amount. This is readily apparent by reviewing District Court Finding No. 22 (R. 36-37). All of the sales, except to Kaiser and in export, were in an unrelated geographical market. None of the sales were the result of competitive transactions.

The specific evidence and circumstances concerning the Japanese export sales have been discussed in detail in Kaiser's opening brief (pp. 39-44). The Government brief improperly supplements the record in this regard by citing material (on p. 56) concerning later sales in export from sources which were not in evidence in the case. Nevertheless, the points made by the Government emphasize and reinforce the position of taxpayer that, if any sales by Utah Construction Company are to be used, it is only these export sales which meet the test of being "representative."

On page 56 of its brief the Government refers to "substantial tonnages" of iron ore sold by Kaiser to a "variety of customers." What transactions these were cannot be gleaned from the record. The only sales of iron ore by Kaiser Steel during the period in question were a sale of some 18,000 tons to Riverside Cement Company in the fiscal year ending June 30, 1949, and a sale of some 60 tons in the fiscal year ending June 30, 1950. (Exhibit 24). No finding was made by the Court in this regard since these sales were not regarded as being "representative." Incidentally, it may be noted that the mine prices for these sales were very significantly in excess of the prices found by the District Court to be representative prices for Kaiser's ore (Finding No. 35, R. 41).

The attack on the use of Lower Lake Port prices commences with citation of *Ames v. U. S.*, 330 F.2d 770 (9th Cir. 1964). That case had to do with the determination of a representative market price for limestone at the taxpayer's mine in Arizona. The lower court used for this purpose the price realized in arms length transactions by a nearby Arizona limestone plant and rejected market prices from the Sacramento-Placerville region of California and from areas in Michigan. This approach was upheld on appeal. Two important distinctions are at once apparent—first, there were sales of the mineral involved from nearby mines at reliable market prices. This factor is absent in our case. Secondly, in the *Ames* case there was no showing of any economic relationship between the California and Michigan sales on the one hand and transactions in Arizona on the other. Indeed, in *Ames* there were even differ-

ences in "size and quality" of materials as between the various locations. (330 F.2d at 772, fn. 4). The record in this case was entirely different. (Appellant's Brief pp. 33-39) It was demonstrated that the end product, namely iron and steel produced from Lower Lake ore, did have a significant economic relationship with products produced from Kaiser's ore. Such products moved from one part of the country to the other, and the prices of each affected the prices of the other. Though it is true that no Great Lakes ore as such moved into California, a very considerable and significant volume of products manufactured from Great Lakes ore did move into and affect California iron and steel markets*. On the basis of this evidence, which is undisputed, it was then clearly established that because of the relationship between the finished products, there is, in the economic sense, a price relationship between the raw materials. It is on the basis of this evidence that Kaiser proved that the Lower Lake Port ore price is an appropriate indication of the representative market or field price for Kaiser's ore.

The relevance of market prices from other areas has not been ignored even by the Commissioner. In Regulations proposed in 1956‡ the Commissioner notes that if there are no commercial sales of the gross income product in the vicinity of the taxpayer's mine, then the market price of the gross income product must be determined by the use of "other appropriate methods" and that among the methods "that may be appropriate" is "comparison with prices at which crude mineral products or processed mineral products identical or similar to the taxpayer's gross income produce are sold commercially *in other areas,* with proper adjustments * * *."† (Emphasis added).

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*On the basis of the undisputed evidence of competition between products made with Lower Lake ore and products made with Kaiser ore, we submit that Finding No. 33 (R. 40) to the effect that Lower Lake ore "had no economic effect" on Kaiser's market area is clearly erroneous even by the classic test.

‡Appendix D, Kaiser brief, pp. 9-10.

†Another example of the Court's inconsistency in applying the legal test of whether a particular transaction was representative, consists in the use by the Court of prices derived from sales of ore made by Utah

B. Freight Adjustment.

Turning now to the argument that the Lake Port prices are improper because they include freight from various mines to the Lake Ports (Government brief p. 62) it should be noted that the eastern iron and steel producers procure ore at the Lake Ports for use in their particular production facilities. Kaiser is merely saying that it procured ore at Fontana for use in its facility. Therefore, assuming that the delivered Lake Port prices and the delivered Fontana price are equated, as economic evidence indicates is proper, then it is in order to deduct, as Kaiser has done, the freight from Fontana to Kaiser's mine in order to determine the mine price at Kaiser's mine. This adjustment has been made. In order to determine the mine price at some other mine, assuming the Lake Port price to be a representative price at the point of sale, it is necessary to deduct from such price the freight between the point of sale and that particular mine. This fact, however, in no way weakens the relevancy of the Lake Port price.

Regardless of what market price is used, the freight adjustment (which the District Court failed to make) is necessary in all events. If, as *Cannelton* says, we are to determine the price at which Kaiser would have sold its ore had it not been an integrated producer, then we start from the premise that exporters purchased Utah ore delivered at Long Beach for $7.65 per ton (Ex. 1). Assuming *arguendo* that the District Court is right in its conclusion that prices for Utah ore are representative of prices for Kaiser ore, we must assume that exporters would purchase Kaiser ore for the same $7.65 per ton delivered at Long Beach.

Construction Company in unrelated markets remote from Kaiser's iron mine at Eagle Mountain, California. These include all of the sales by Utah Construction Company other than the sales made to the Kaiser Steel mill at Fontana and the export sales at Long Beach, California. The Court recognized the legal principle in Conclusion of Law No. 7 (R. 53) that "Prices paid by buyers in unrelated geographical markets . . . have no bearing" in determining a representative market price and therefore refused to apply the Lower Lake ore prices. It then proceeded to completely and inconsistently disregard this legal principle when it included sales of iron ore by Utah Construction Company which were made in geographical markets entirely unrelated to Kaiser's California iron ore mines.

What then is the Kaiser Eagle Mountain mine price for ore? It must be the price at Long Beach less the freight from that point to Kaiser's mine. So, if Kaiser was an independent producer selling to itself and others in its market area on the same basis that Utah Construction Company sold to Kaiser and the exporters, then the mine price on which Kaiser would compute its depletion would be the net mine price arrived at by deducting the freight from the delivered price. Determination of Kaiser's mine price on any other basis is clearly contrary to the teaching of the *Cannelton* case and clearly contrary to the statute and regulations. The Commissioner's proposed 1956 regulations (Appendix D, Kaiser Brief, pp. 9-10) required that "proper adjustments . . . for material differences . . . (such as differences in . . . transportation costs . . .)" be made.

C. Other Recognized Commercial Adjustments.

In order to be consistent with its stand on coal, the Government is forced to take the position (Brief, page 65) that adjustments in iron ore prices, for the purpose of determining a representative market price, to reflect greater iron content are "value" adjustments and should not be recognized. The testimony is undisputed (Exhibit SS, 1949-1950 Editions of Mining Directory of Minnesota—Table 15, page 235) that price is adjusted in the market on the basis of iron content and that this is uniformly done. The Government's position is not supported by a single fact in the record and is untenable as a matter of law.

The Government also raises the point that if adjustments are to be made in iron ore prices, then a downward adjustment should be made because of the greater sulphur content of the taxpayer's ore. The only difficulty with this contention is that there is no evidence in the record which directly or indirectly indicates that any *price* adjustment is made in the market for ore containing the sulphur content present in the Kaiser ore. On the contrary, the only testimony is that there would be no penalty (Pardee, Tr. 586-587). Further, the evidence is uncontradicted that the sintering process which is uniformly practiced in the West in order to improve the physical structure of ore (Christensen, Tr. 543;

Powell, Tr. 751) results in removal of any sulphur as an adjunct of the sintering.

IV. COKING COAL

A. Utah Fuel Company Transactions.

Turning to the question of coking coal, we start with the undisputed facts that the sales of coking coal by Utah Fuel Company were made in the commercial market and not for coking purposes, that the coal was not suitable for commercial purposes* and that it had been sold at a loss continually from 1929 through 1950 with the sole exception of a minimal profiit in the year 1949. (Kaiser brief, pp. 15, 45-49) The Government's brief acknowledges (p. 34) that "if a miner produces only one mineral from one mine and sells it below cost—a situation unlikely to continue for any length of time—the price will probably not be representative of prices charged by less irrational producers intent on a profit." That, in essence, is what Kaiser has been urging all along, namely, that sales of Sunnyside coking coal by Utah Fuel Company at less than cost for non-coking uses are not representative of prices which would be charged for coking coal in the usual market situation and do not meet the standard of a representative price for Kaiser's coking coal.

The Government's brief (p. 35 *et seq.*) proceeds to speculate at great length on the reasons why Utah Fuel Company continued to sell Sunnyside coking coal on the commercial market at a loss and wanders over a great range of possibilities. There is no need for such speculation; the record in this case clearly establishes why the Sunnyside coking coal was sold by Utah Fuel at a loss over this period of time. The reason is simply that Utah Fuel Company wanted to keep the Sunnyside mine open in the hope that it eventually could realize its potential by serving as a source of

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*The evidence reviewed on Page 46 of Kaiser's brief makes it plain that the District Court's Finding No. 41 (R. 42) to the effect that the Sunnyside coal was *"Suitable"* for non-coking uses is clearly erroneous. There is no evidence whatever in the record to support the lower court's conclusion and the Government brief mentions none.

supply of coking coal for a steel operation. (Heiner, Tr. 330-1). If that potential were realized, then the losses would be recouped and the coal could be sold to a steel maker at a realistic market price.*

As to the so-called "end use" test, (sales for commercial versus sales for coking purposes) the position of Kaiser is simply that while the question of use standing alone may be irrelevant, the purpose for which a product is sold is important in determining whether a particular price meets the standard of a representative market price. Thus where a product is adapted for a certain purpose and when sold or utilized for that purpose commands a certain price, that price is the representative price of the product. The fact that the product may unsatisfactorily be used for other purposes, and when so used commands a lesser price must be considered in deciding whether that price is a "representative" market price. The principle is well illustrated in *North Carolina Granite Corp.,* (supra).

It is further suggested (Government brief, p. 39) that if the Sunnyside coking coal of Utah Fuel Company could command a higher price when sold for coking purposes, it would have been

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*The Government in its brief refers (ft. 9, page 40) to the contract between Utah Fuel and Taxpayer (Exhibit 32). The reference is inaccurate. This contract is clear evidence that Utah Fuel was not intending to restrict itself to commercial prices. Utah Fuel was only agreeing to sell coal to Kaiser at commercial prices "for a period not to exceed one year" from date of the agreement in the sole event that Kaiser was unable to produce coal from the leased premises. It is obvious, as Mr. Heiner testified, that Utah Fuel's intention was to command the higher prices which the product would demand for coking use in the event the leased property could not be brought into production. This is fully evidenced by the later agreement entered into between Utah Fuel and Kaiser-Frazer (Exhibit 20 also referred to by the Government). Contrary to the Government's statement the price in this agreement was $4.50, *plus* additional adjustments for amortization and labor increases. More important, it gave Kaiser-Frazer the right to purchase Sunnyside coal not "at any more favorable price which Utah Fuel granted to any of its commercial customers" as claimed by the Government, but only at a more favorable price (a) secured for coal sold "for like or comparable use," (i.e., a coking use), or (b) for railroad locomotive use. It is apparent from the prices secured by Raton that coal for locomotive use sold at or about the same price as for coking use. (Finding No. 65, R. 48)

sold as such. To this suggestion the reply is: sold to whom? The record in the case clearly indicates that there were only three steel producers that utilized coking coal in the entire western United States, namely, Geneva Steel Company, which produced its coking coal from its own captive mines, Colorado Fuel and Iron Corporation, which obtained the great bulk of its coking coal from the Raton mine, and Kaiser, which procured its coking coal from the leased Sunnyside properties. These markets were satisfied and thus there was no opportunity for Utah Fuel Company to sell its excess coking coal production for coking purposes.

The fact that Utah Fuel Company may or may not have made a profit from other operations which it used to sustain its losing operation at Sunnyside is totally irrelevant. If the company chose to make sales at less than cost in order to work toward an ultimate business purpose and draw on the profits or resources from its other operations to sustain the Sunnyside mine, that does not bear on the question of the price Kaiser would charge for coking coal from its mine, nor does it serve to render the Sunnyside price a "representative" market price.

The suggestion that there were a great number of suppliers of coking coal (Government brief, p. 40) and therefore a buyer would be unlikely to pay a "premium" price for Sunnyside coal is not only untenable but highly misleading. Geneva Steel Company procured its supply from a captive mine and neither sold nor purchased any significant quantities of coking coal from outside sources except in extraordinary circumstances. Colorado Fuel and Iron Corporation purchased the bulk of its requirements from Raton Coal Company and obtained additional quantities from a number of small suppliers in the Colorado area. There is no showing whatever that these small suppliers could have produced any more than they did and indeed the testimony was that coal for coking purposes in that region was in very short supply. Nevertheless, it was the Raton mines which had *established* a market price for coking coal and this was where a buyer (Kaiser Steel) would have to go and the price he would have to pay. It is these prices which taxpayer contends must be used as the basis for

arriving at a representative market price for the Sunnyside coal. These are not *premium* prices—they are actual prices.

If the Sunnyside No. 2 Mine (which Kaiser leased) had been operated by an independent producer and not leased to Kaiser, then it would have been necessary for Kaiser to obtain coking coal from either Raton Coal Company or from that independent producer, or else close down its blast furnaces entirely. The Raton Coal Company price for coking coal is established by its sales to Colorado Fuel and Iron Corporation and it is undisputed that it would have been delivered at Fontana for the same freight rate as the coal from Sunnyside. (Kaiser's Brief, p. 52) This Raton price establishes what an independent producer at Sunnyside would have sold for. It is clearly evident that if Kaiser had been required to purchase on the open market from an independent producer the coking coal which it mined from the leased Sunnyside mine, such coking coal would have commanded prices at least as great as those paid by other users of the same product for coking purposes.

B. Kaiser's Coal Sales.

The number and size of sales of Sunnyside coal by Kaiser itself were so small, in relation to the size of its overall operation at the Sunnyside mine, as to be *de minimis*. (25,260 tons out of 416,615 for 1949 and 28,340 out of 591,568 for 1950—Findings 36 and 41, R. 41, 42-43). The transactions were not representative (Kaiser's Brief, pp. 14, 50-51). They were made at cost and came about when Kaiser was attempting to assist another steel producer whose mine had been shut down (Heers, Tr. 94-95), or as a result of losses of coal in transit by railroads (Heers, Tr. 97, 107, 117) and for other similar reasons unrelated to any market price for coal. Kaiser simply was not in the business of selling coal (Heers, Tr. 96) and the prices realized in these specialized transactions do not meet any of the standards of representative market prices.

The suggestions on pages 41 and 42 of the Government brief that Kaiser sold substantial tonnages of coking coal in 1951 and 1952 are completely misleading. Kaiser acquired the stock of

Utah Fuel Company in 1950 (Heers, Tr. 65) and dissolved that company into Kaiser Steel in 1951 (Heiner, Tr. 383). Utah Fuel Company had a number of mines other than Sunnyside. These mines produced only commercial coal *not* suitable for coking uses which was sold throughout the western United States (Heiner, Tr. 306-8). Kaiser acquired these mines through the stock acquisition and around 1952 disposed of them (Heiner, Tr. 368-9; 405). It is sales of commercial non-coking coal from these mines which were made in 1951 and 1952. Thus the sales referred to are not sales of coking coal at all. Since counsel who prepared the appellate brief were not present at the trial, it is likely that counsel were unaware of these facts and did not realize the statements are inaccurate and misleading. All of the cases have recognized that there is a distinction of commercial substance between coal of coking and non-coking quality and that prices for coal *not* suitable for coking cannot establish a price for coking coal. *Alabama By-Products Corp. v. Patterson,* 258 F.2d 892 (5th Cir. 1958).

C. Failure of District Court to Utilize Raton Coking Coal Transactions.

Kaiser is *not* in agreement that those sales by Raton Coal Company to Colorado Fuel and Iron Corporation, which were arm's length transactions between a seller of coking coal and a direct consumer for the purpose of producing metallurgical coke, should only be *considered* and that they "*confirm* . . . sales prices obtained by Utah Fuel Company" (Finding 71, R. 50). On the contrary, these Raton prices establish the basis for a representative market price (as adjusted by normal commercial practice) and *must be used* for that purpose. The Court did not use them. (Kaiser's Brief, pp. 51-53). The Government does not dispute this and has no answer for it. This is clearly reversible error.

The Government attempts to minimize taxpayer's position that the sales by Raton Coal Company to Colorado Fuel & Iron are the ones which must be used for the purpose of arriving at a representative market price for Kaiser's Sunnyside coal upon the basis

that other sales were made by Raton Coal Company which should also be used. It is, of course, true that such other sales were made. However, the sales to Colorado Fuel & Iron were to a direct consumer and were the only sales of coal for coking purposes other than the test sales to Sheffield and Kaiser Steel in the years in question. The sales to Colorado Fuel & Iron aggregating approximately 1,600,000 tons represent more than two-thirds of the tonnage sold by Raton in the years 1948, 1949 and 1950. Of the remaining sales approximately one-half were made to the Santa Fe Railroad another direct consumer, for non-coking purposes. The approximate 200,000 tons sold by Raton in the years in question to "retail dealers" were at prices which were approximately one-half of those realized on the sales to Colorado Fuel & Iron and the Santa Fe Railroad. These "dealer" sales were for commercial purposes and the price obviously reflects the same deficiencies in coking coal for domestic uses as was found to be the case by Utah Fuel Company. They were also sales made in an entirely different market to "retail dealers" at wholesale prices which are far less than those realized on sales to a direct consumer. This is self evident from the prices set forth in Finding 65 (R. 48). The coal produced from the Kaiser Sunnyside mines was "sold" to Kaiser Steel, a direct consumer, for use in its blast furnaces. It is this coal for which we are seeking a "representative" market price. The price for coking coal for this type of use is clearly reflected and established by the Raton sales to C.F.&I. The teaching of the *North Carolina Granite Corp.* case (supra) is clearly to the effect that a wholesale price for coal for a use for which it is not suitable cannot be "representative" of a price to a direct consumer for a use for which it is directly suited.

Finally, there is no reason suggested in the record to disregard the transactions in Oklahoma-Arkansas coal. The District Court said that this coal was not of like kind and grade as the Sunnyside coal. The only difference, however, is that the so-called low volatile coal has more fixed carbon and less volatile matter than the high volatile coal. (Finding No. 56, R. 46). For that matter the Sunnyside coal has more fixed carbon than the Raton coal, (compare

Finding No. 59, R. 46 and Finding No. 66, R. 49) but that fact does not render these two coals of differing kind and grade on the basis of the Court's own findings. Similarly, a mere difference in fixed carbon content should not constitute the Sunnyside coal a different kind and grade from the Arkansas-Oklahoma coal. Therefore, prices established for the Arkansas-Oklahoma coal in open market transactions should be considered along with the prices for the Raton coal in establishing a representative market price for Kaiser's Sunnyside coking coal. The Government's attempt to dismiss the Oklahoma-Arkansas coal as a mere "additive" is simply a play on words. Both coals are utilized in producing coke for the blast furnace, neither could be used alone to make a satisfactory coke (Finding 60 and 61, R. 46-47), and both are of equal importance in the coking process.

D. Adjustments to the Raton Price.

The recognized commercial adjustments necessary in order to arrive at a representative market price for the Sunnyside coal were not applied to these Raton prices and were rejected by the District Court. The prices obtained in those transactions must be viewed in the light of the fact that the Raton coal was sold unwashed and that even when washed it had a higher ash content than the Sunnyside coal. The reason these factors must be considered in establishing a representative market price is because the market itself considers such factors in establishing a price. The uncontradicted testimony in this regard was reviewed in detail at pp. 55-58 of Kaiser's Brief. All of the decided cases to date have distinguished between washed and unwashed coal in determining prices. No answer is made by the Government to this point. The District Court properly found that the most important factor in coking coal is the amount of the fixed carbon. (Finding No. 54, R. 45). The uncontradicted testimony also establishes that it is the most important factor in *pricing* coal. No finding was made by the Court on this point. Coal with less ash has more fixed carbon and therefore sells for a higher price. The representative market price of coal with more fixed carbon (and less ash) is higher than the

representative market price for coal with less fixed carbon (and more ash).

The Government does not appear to dispute the propriety of these adjustments. Instead it tries to dissipate the significant effect of these most important factors, i.e., a washed coal with higher fixed carbon, by arguing that the Court found there were other factors which made the Raton coal as desirable and therefore "resulted in a 'standoff' between that coal and Sunnyside coal" (Government Brief, p. 50). The record simply does not support this contention.

The Trial Court did not find there was any "standoff". It found only that "the advantages . . . *minimize* . . . the differences" (Finding 69, R. 50). Even this finding has no support in the record.

It is contended that the Raton coal had greater plasticity and that this factor gave it an advantage with respect to the Sunnyside coal. Be this as it may, the Government's own witness testified that he "couldn't put any dollar value" on the effect of plasticity on price (Johnson, Tr. 1002) and that so far as plasticity goes high volatile coals "all sell at the same price" (Johnson, Tr. 1012). The positive testimony is that plasticity is "not recognized" in the price of coal (Keenan, Tr. 290). Of equal significance is the fact that the Government's witness, Johnson, who expressed his personal opinion as to the coals being "about a standoff" (Tr. 1001), had testified earlier on direct in the same series of question that he had *not* arrived at any conclusion concerning the relative value of the two coals based on ash, sulphur and plasticity because he could not "dollarize" the effects of plasticity (Tr. 996-997).

It is also argued that the factor of sulphur would result in a market price lower than that being contended for by the taxpayer. In support of this contenton, reference is made to the testimony of the witness Heers. While it is the fact that Heers testified to a 5¢ to 10¢ per ton difference in value for each 1/10th of 1% sulphur difference, this testimony was given in the context of an overall appraisal of differences in prices. At the same time, Mr.

Heers testified that there is a 30¢ to 40¢ difference in price per unit of ash and that the Sunnyside coal was 11 points better than the Raton coal. The net effect of such an adjustment obviously would be well in excess of that for which the taxpayer is contending. It should also be remembered that the uncontradicted testimony of Mr. Keenan (Tr. 273) is that in western practice any sulphur content under 1% is of no concern to the buyer.

Finally, it should be noted that the Government's own witness, Johnson, testified that the differences in ash and sulphur between the Sunnyside and Raton coals would result in a 60¢ to 70¢ difference in favor of the Sunnyside coal (Tr. 971). The witness own worksheet (Pl. Ex. 41) shows that these differences were $1.65 in 1949 and 58¢ to 69¢ in 1950. When he was asked to consider the fact that in addition one coal was washed and the other unwashed, he testified that this "might make around a dollar difference" (Tr. 1020). Thus, if we are to use the Government's own testimony in this connection for the purpose of making the adjustments due to the recognized commercial differences, we would have a minimum adjusted price of $6.94 for 1949 and $7.03 for 1950, based on the sales prices from Raton Coal Company to Colorado Fuel & Iron (Appendix G, Kaiser's Brief). Contrary to the Government's claim, the taxpayer's dollar figures are not only clearly supported but are less than the amounts that would be arrived at by using the Government's own testimony.

V. CONCLUSION

The principal errors of the District Court lie in its failure to observe the legal standards applicable to the facts. The case should be returned to the District Court for correction of these errors.

As to the iron ore, the District Court should be directed to determine a representative market price based upon (a) Lower Lake Port ore prices, (b) an adjustment of these prices for those pricing factors recognized in commercial practice (i.e., for iron content), and (c) the establishment of a mine price *at Kaiser's mine* by deducting from the market price at the point of sale the

freight from Kaiser's mine to such point of sale. The mine prices realized by Utah Construction Company in Utah for its iron ore transactions do not meet the standard of establishing representative market prices for Kaiser's iron ore in California. The only such prices which possess even some of the indicia of being representative are the export sales at Long Beach.

As to the coking coal, the District Court should be directed to determine a representative market price based upon (a) the prices realized on the sales of the Raton coal to Colorado Fuel and Iron Corporation, (b) adjustment of these prices to reflect the recognized commercial pricing factors of ash content and washing operations, and (c) an averaging of the resultant adjusted price with the prices realized on the arm's length sales of Oklahoma-Arkansas coking coal. The sales of coal by Utah Fuel Company at distress prices for non-coking use and the minimal volume of accommodation sales by Kaiser do not meet the standard of establishing representative market prices for the coking coal mined by Kaiser.

Dated: June 10, 1968

Respectfully submitted,

GEORGE E. LINK
EDWARD J. RUFF
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By EDWARD J. RUFF

Attorneys for Appellant

VI. CERTIFICATE OF ATTORNEY

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

EDWARD J. RUFF

Attorney

No. 22274

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK A. EYMAN, SUPERINTENDENT
ARIZONA STATE PENITENTIARY,

APPELLANT

-vs-

ROBERT ALFORD,

APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR APPELLANT

JERRY L. SMITH
ATTORNEY FOR APPELLANT

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 22274

EYMAN, SUPERINTENDENT ARIZONA STATE PENITENTIARY,

APPELLANT,

-vs-

ROBERT ALFORD,

APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant, Frank Eyman, Superintendent of the Arizona State Penitentiary, is before this Honorable Court on appeal from an Order granting Writ of Habeas Corpus by the United States District

Court for the District of Arizona, The Honorable C. A. Muecke presiding.

The Appellee, ROBERT ALFORD, is now imprisoned in the County Jail of Coconino County, in Flagstaff, Arizona, pursuant to the Order of the Honorable C. A. Muecke entered on the 30th day of June, 1967; that this Order was subsequently modified by an Order being entered on the 10th day of August, 1967, staying the Writ of Habeas Corpus until the determination of the Appeal from said Order.

The appellee was charged with three (3) counts of First Degree Murder by Criminal Complaint on the 16th day of July, 1963 to which he first entered a plea of not guilty on the 30th day of July, 1963 by and through his attorney, JOHN M. GRACE; said plea being subsequently changed to guilty on the 20th day of September, 1963; The appellee was adjudged guilty on his plea by the Honorable

[illegible] [illegible] [illegible] [illegible] of [illegible], the Commandant [illegible] [illegible], [illegible].

The Appellant, [illegible] [illegible], is now imprisoned in the [illegible] Jail at [illegible] Germany, in [illegible] [illegible], pursuant to the orders of the [illegible] [illegible], [illegible] sentenced on the [illegible] day of [illegible], 1947; that said [illegible] was [illegible] [illegible] by an order [illegible] on the [illegible] day of [illegible], 1947, [illegible] the [illegible] of [illegible] [illegible] [illegible] the [illegible] of [illegible] [illegible] [illegible] [illegible].

The Appellant was [illegible] with [illegible] [illegible] [illegible] [illegible] [illegible] by [illegible] [illegible] on the [illegible] day of [illegible], 1946 [illegible] [illegible] [illegible] [illegible] a [illegible] of [illegible] [illegible] on the [illegible] day of [illegible], [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] on the [illegible] day of [illegible], 1947; the Appellant was [illegible] [illegible] [illegible] [illegible] by the [illegible]

Laurance T. Wren, Judge of the Superior Court of Coconino County, and was sentenced to be executed. Appellee exhausted his appeal remedies by appeal to the Arizona Supreme Court, and by application for Writ of Certiorari to the Supreme Court of the United States.

The proceedings before the Arizona Supreme Court resulted in affirmation of appellee's conviction and sentencing, State of Arizona vs. Alford, 98 Ariz. 124, 402 P.2d 551, and Motion for Rehearing, State vs. Alford, 98 Ariz. 249, 403 P.2d 807, denied June 29, 1965.

Application for Writ of Certiorari to the Supreme Court for the United States was made June 28, 1965, and on January 24, 1966, the United States Supreme Court (Alford vs. Arizona, No. 481 misc. Oct. Term, 1965) entered the following Order:

"The Petition for Writ of Certiorari is denied. Mr. Justice Douglas is

[illegible]

[illegible]

[illegible]

[illegible]

of the opinion that it should be granted."

Jurisdiction of the United States District Court for the District of Arizona was invoked by reason of 28 U.S.C.A. 2241 (c)(3).

The United States District Court for the District of Arizona granted ROBERT ALFORD'S Petition for Habeas Corpus on the 30th day of June, 1967, in Phoenix, Arizona.

Notice of Appeal of the granting of Habeas Corpus was filed on the 27th day of July, 1967, in the United States District Court for the District of Arizona, in Phoenix, Arizona.

STATEMENT OF FACTS.

On June 6, 1963, the bodies of three victims, their names, Carol Ann McCain, Jacqueline Walker and Theodore Walker, all being minor children were found approximately one mile South of Highway 66, near

Williams, Arizona. The initial investigation revealed Carol Ann McCain had been shot four times, Jacqueline Walker and Theodore Walker had each been shot twice. In addition Carol Ann McCain had been beaten severly around the head.

Thereafter the defendant, petitioner herein, was developed as a suspect, and was arrested on July 12, 1963, at Santa Rosa, California. That the petitioner was arrested at 4:45 p.m. by Lt. Robert Hays of Sonoma County Sheriff's Office along with Ron Stamp of the Federal Bureau of Investigation.

The petitioner, at this time, was advised of what he was being arrested for, and further advised that he did not have to make a statement, who the officers were, and was then taken into custody. No statements of any kind were taken at this time. The defendant was then transported to the Sonoma County

Jail, Santa Rosa, California, whereupon he was booked and fed.

At approximately 10:00 p.m., on July 12, 1963 an F. B. I. Agent, by the name of John Huber, interviewed this defendant and advised him of his rights in the following manner. (See Transcript of District Court Hearing, November 22 and 23, 1966, hereinafter referred to as T., pages 140 and 141):

1. That any statement the petitioner would give had to be voluntary.

2. That said statement could be used against him.

3. That John Huber would testify against him; that he petitioner had the right to an attorney at the time of the interview, and there was a telephone on the desk which he could use to call an attorney.

4. That if he could not afford an attorney he could have one through the public defender's office.

5. Mr. Huber further advised that he would not threaten or abuse him, and that he had a right to

remain silent and could walk out and go back to his cell at that time.

6. That Mr. Huber advised the defendant of the nature of the investigation and of the charges to be filed against him.

7. That Mr. Alford did not want an attorney.

The interview lasted approximately one and one-half hours. Thereafter a polygraph examination was given to the petitioner, at petitioner's request, on the 13th day of July, 1963. On July 14, 1963, at 1:30 p.m., again defendant having been advised of his rights, as heretofore stated, the defendant gave to Mr. John Huber and Clarke Cole, a statement in which he confessed to the killing of three victims, Carol Ann McCain, Jacqueline Walker and Theodore Walker.

The petitioner signed a Waiver of Extradition at approximately 5:00 p.m. on July 14, 1963, only after being advised of his rights at that time by

a municipal judge.

At the time the petitioner was taken into custody he was not indigent in that he had $435.00 on his person plus an unencumbered pickup-camper. The petitioner was returned to Flagstaff on July 16, 1963, at which time he was taken before the Justice of the Peace, James F. Brierley, who advised him of his right to have an attorney, the charges against him, and right to a preliminary hearing.

The defendant, patitioner herein, was brought before the Justice of the Peace on the 18th day of July, 1963, on the 20th of July, 1963, and on the 22nd day of July, 1963, at which time a preliminary hearing was conducted. Mr. Alford either refused or would not hire an attorney to represent himself at the preliminary hearing even though he was not indigent. The preliminary hearing was conducted and defendant, petitioner herein, was

bound over for trial in the Superior Court of the State of Arizona in and for the County of Coconino.

An information was filed on July 26, 1963, and on July 30, 1963, defendant appearing in person and with his employed counsel, John H. Grace, and entered a plea of "not guilty". (Emphasis supplied). Trial by jury was set for September 23, 1963, at 9:30 a.m. A time for hearing as to the mental ability of the defendant to stand trial for three counts of murder was set for September 20, 1963, and on said date defendant appeared in person and with his attorney, John H. Grace.

The defendant was examined by a competent psychiatrist, Dr. Maier I. Buchler, and a psychologist, Dr. Canter, both of whom determined him to be legally sane and fully able to cooperate and assist his attorney in his defense.

Dr. Maier I. Buchler was sworn to testify on October 1, 1963, pursuant to Rule 250, and stated that defendant's mental ability was such that he was able to stand trial and assist counsel in his defense. Defendant thereupon moved the Court to withdraw his plea of not guilty, theretofore entered as to each of the counts against him. Motion was granted. Thereupon, the defendant herein entered his plea of guilty as to Counts I, II and III as charged in the information. This was done as follows:

'MR. GRACE: May it please the court, in view of the doctor's testimony, at this time the defendant withdraws his plea and enters a plea of guilty.

THE COURT: This is as to all three counts, Mr. Grace?

MR. GRACE: Yes, Your Honor.

THE COURT: I would like to have the defendant himself enter these pleas.

MR. GRACE: Yes, Your Honor.

THE COURT: Will the defendant stand, please?

(the defendant does so)

Mr. Grace, you are requesting permission from the court to withdraw the pleas of not guilty heretofore entered before the court. Is that correct?

MR. GRACE: Yes, Your Honor.

THE COURT: Very well, it is ordered that the defendant is granted permission to withdraw the pleas of not guilty entered to each count on July 30th and entered in this record.

And it is your desire at this time, Mr. Grace, to have your client enter another plea. Is that correct?

MR. GRACE: Yes, your Honor.

THE COURT: Mr. Alford, is it your desire, as your counsel has stated, to withdraw your pleas of not guilty heretofore stated?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Will you waive specifically the reading of the information, Mr. Grace, as you did heretofore?

MR. GRACE: Yes, Your Honor.

THE COURT: Mr. Alford, what is your plea, then to the charge that you did wilfully, feloniously deliberately, and with premeditation and malice

aforethought kill, to wit, murder in the first degree, Jacqueline Walker, a human being? What is your plea: Guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: And what is your plea to the charge as stated under Count 2 of the information, that you did commit murder in the first degree upon the person of Theodore Walker, a human being? Guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: And under Count 3 you are charged with murder in the first degree of Carol Ann McCain. What is your plea that charge: Guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: Let the record note the defendant has entered a plea of guilty to each of the three counts stated in the information.

I would much have preferred that this matter, whether this man lives or dies, be placed before a jury of twelve men and women. It is something that I want substantially more than a few days to decide. I will set this matter for sentencing on October -- (the court consults the calendar) I will set it on October 7th at 10 o'clock in the morning. I know our calendar is clear on that day. In the meantime, the defendant will be remanded to the

custody of the Sheriff's Office, where he will again be held without bail.

I would like the County Attorney's Office, in the meantime, to submit to me a full written report within the next week on the evidence that they intended to introduce at this trial and what they sincerely believe to be the facts of this case. I will designate that before this report is filed, it be exhibited to Mr. Grace for his approval or disapproval either as to the whole or any specific parts thereof. And, Mr. Grace, you may likewise within the next week submit a written report, if you desire, and likewise exhibit a copy to the County Attorney's Office.

If there is nothing further, then, from the defense or the State, we will stand adjourned.

Anything further?

MR. GRACE: No, Your Honor."
(R.T., pp. 19-22, at Hearing on October 1, 1963)

The date for the trial had been set for September 23, 1963, at 9:30 a.m., and on that date the State of Arizona had some 35 witnesses, with 22 being from out of state, ready to go to trial. Counsel for the defendant was well aware of these

witnesses and the evidence to be presented against Mr. Alford and as a consequence of the September 20th hearing and the overwhelming evidence against the defendant, the defendant changed his plea from not guilty to guilty.

That counsel for the defendant did not request the court, pursuant to Rule 336, for a mitigating or aggravating circumstance hearing, however, the court, upon it's own, conducted an investigation and inquired into all the circumstances surrounding this crime as is shown by the total record made to date.

On October 7, 1963, this being the time set for passing of sentence, defendant appeared in person and with attorney, John H. Grace. The defendant, at the last moment, asked the court to withdraw his plea of guilty on all three counts heretofore entered. The defendant's request to

withdraw his plea of guilty was denied. It was the judgment of the court that defendant was guilty as charged, and it was ordered by the Honorable Laurance T. Wren, Judge, that he be punished on each of the three counts, by being executed, in the manner prescribed by law, on December 13, 1963, at the Arizona State Prison, Florence, Arizona.

That at the hearing on the Writ of Habeas Corpus before this Honorable Court, held on November 22nd and 23rd, 1966, Mr. John M. Greco, defense counsel for defendant, Robert Alford, testified that with the great number of witnesses available to the State of Arizona, the lack of an insanity defense, the confession and numerous conflicting statements subsequently given by the defendant after his confession and thorough investigation of the case and numerous interviews with the defendant, he felt that he could do

nothing else but advise his client to change his plea from not guilty to guilty and throw his client upon the mercy of the Court. (R.T.W.H. in U. S. Dist. Ct. p. 73 and p. 88). This decision was made by an experienced defense attorney who has defended some six murder cases, plus having a fine reputation in the County of Coconino as being an experienced defense attorney. In addition, the defense counsel was furnished extensive investigative help through the County Attorney's Office, the F. B. I., and the Sheriff's Office in the preparation of his case (T. pp. 118, 144, 145, 153, 154, 187, 188, 190).

That at the time of sentencing conducted on October 7, 1963, the prosecution presented to the Court in a presentence report a complete review of the case that was to be presented to the jury, defense counsel presented an extensive

presentence report and the Court, on its own, conducted a very extensive presentence investigation.

This is born out by the Reporter's Transcript of proceedings conducted October 7, 1963, pages 33 and 34 and pages 36 through 44 which are very noteworthy, as follows:

> "Mr. Alford, never has this court made a harder decision than the one that I have to make now. I want you to know that I have spent many days and some sleepless nights, and that I have studied every angle and every possible facet. The reports, I have gone through time and time again, as I indicated to you. Like every Christian, Mr. Alford, I have a deep and abiding faith in the existence of God, and I have always felt that the taking of a human life is something that is best left to accident and the will of God. But in considering that factor, I realize full well that we are not here concerned with vengeance. We are concerned with the law that gives me two choices, and the law which states that I should select one of those alternatives on the basis of the facts that you yourself have created. My decision in this particular case would be an easy one, if by taking your life I could restore the life

of just one of the children whom you have killed. But this is not possible. I know that my decision will draw criticism, whichever way I decide; and I have earnestly tried to ignore this factor and to judge this matter solely upon the merits and what little wisdom I might possess. I was impressed by the report that your attorney filed in this matter on your behalf, and I would like for you and for the courtroom to hear the last paragraph of it.

(reading)

I trust that my thoughts stated herein will aid the court in reaching its decision as to the sentence to be imposed upon Mr. Alford, and I feel that whatever the sentence is, the Court will be fully advised of all aspects of the case and will reach a decision, in pronouncing this sentence, which will be true justice for my client and for society.

(end reading)

In making a decision in this case Mr. Alford, I considered many factors. For your benefit and the benefit of the people in this courtroom, I would like to enumerate some of them. One is my deep respect for your attorney. He has discussed this matter with me many times. As I indicated to you a while ago, I am sure he entered this plea -- in fact, I know that he entered this plea with the hope that I would impose upon you a light sentence. As I indicated, he was dead certain, as I am dead certain that a jury carefully selected by the County Attorney's Office, carefully questioned as to the death penalty,

would impose upon you the sentence of death. Less than four years ago in this very courtroom the jury sentenced a man to death for a crime that I consider to be less horrible than yours. I cannot understand, Mr. Alford, what possesses a man, that he can kill three defenseless children; that he can methodically, after shooting them, walk around to each of the bodies and place another bullet through the heart of each, while they are lying dead or dying on the ground, and how he can then beat one of them over the head with the butt of the pistol until the grip breaks. It is beyond my comprehension. In going over the facts of this case, you made me realize the full import of the words "man's inhumanity to man." I did not learn of this, this factor, of this case, until after you entered your guilty plea and I discussed the matter with the investigating officers, in attempting to find out what all the facts in this case were, in order that I could arrive at what I felt to be a just decision. As I stated, I did not until then learn of the fact that beneath each of the bodies they found a 45 caliber bullet on the ground. I was so distrubed by this fact that I called Dr. Tuehler, in Phoenix, the psychiatrist who testified at your insanity hearing. I read to him from the reports describing the finding of these bullets, and I asked him, "could this possibly be the act of a man in a rage; could this be the act of a man with a mental deficiency, with mental disorders, or a man with

sexual problems," all of which he described and touched upon in his testimony and in his written report. He replied to me very emphatically, no, that what he stated about the rule on insanity, the Durham Rule, had no application to this fact. He stated that this was the act of a cold, calculating mind, anxious to destroy anyone who might later testify against him in court.

In regard to his report (to which the court now refers), I would at this time like to go over two or three factors that he mentioned in it. This court is fully considering the fact that you have had mental problems in the past, in regard to your unnatural sex desire for young children, girls. Dr. Buchler, who is one of the finest criminal psychiatrists in this state, indicated that your memory, recall and recollection appear intact, as the past history lucidly demonstrated. He goes on to state that consistent throughout your story is a role that you wish to present: a man who loves children. "As a psychatric entity, it is common," he states, "to find men more or less sexually inadequate attaching themselves to younger children by kindly acts which often disguise sexual wishes." He stated that you were alert and of good intelligence; that the only areas in which your memory appears to be deficient are related to the significant days in question, during which three children disappeared and were later found as victims of a homicide. During this period, you allege amnesia, although during the first day of the interview, you reported

a slightly different version of events. He then goes on to state, finally, "I look upon this alleged amnesia as a fabrication."

(end reference to report)

Again going back to the investigative reports, I note that when you confessed to this crime in California and you admitted firing the first shot at one of the children who was running, that you could not recall what happened from then on; that you blacked out. I also brought out this proposition to Dr. Tuchler; and if there was anything that he was emphatic about, it was the fact that there could be no amnesia in your case, that you could recall each and every of these events very closely if you would care to bring them forward. He was extremely emphatic about that. Amnesia could not be present in your type of case. He said that the details of your past life would indicate this, as well as the details leading up to the actual events.

(the court again refers to the doctor's report)

He goes on to state that the subject is well able to understand the nature and the quality of the cause for which he is charged, and is able to assist counsel in his defense; and concludes by stating that you are fully competent in the medical and in the legal sense.

(end reference)

As I indicated, I asked him about the firing of the 45 bullets, under the Durham Rule. And he said this would not fit the Durham Rule; that it was not any mental deficiency that caused the firing of

the 45, in spite of the initial shooting -- or regardless of the initial shooting of the 32 pistol, I believe.

After you entered your guilty pleas, I discussed the California investigation with the FBI men, four or five of them who were here to testify at your trial. I also looked over the reports submitted by the County Attorney's Office, the Sheriff's Office, Dr. Tuchler, Dr. Canter, and I studied the photographs of the children that were taken at the scene and at the mortuary. I could not then and I cannot now think of a single angle that I did not consider.

Mr. Alford, at this time, when your race is looking for a brighter place in the sun, you commit an act that gives them a great setback, one so horrible that it shocks the senses. As you know, the law leaves me two alternatives, life imprisonment or the death penalty. In considering the sentence of life imprisonment, I considered the fact that you could very possibly be paroled from the State Prison in about ten years. And in considering this possibility of parole, I look at your previous history of criminal acts and I will state to you that it is not a pretty one. In 1930, in Lincoln, Nebraska, you were given one year for breaking and entering. Again in 1930, in Council Bluffs, Iowa, you were sentenced for illegal transportation of liquor. McAllister, Oklahoma, 1935, you were given a five-year sentence for larceny of livestock. In 1943, Plymouth, Michigan, you were charged

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with assault. California, San Joaquin County, in 1958, lewd and lascivious conduct. The record also states that you have had other arrests for vagrancy, prowling, statutory rape, larceny, and molesting. Somehow, Mr. Alford, the thought of you again being free in society leaves me cold.

Mr. Alford, the very seriousness of your crime, the very brutal fashion of it, leaves me no choice. Other people who would commit such an act must know that if they do so, they shall forfeit their own life. With no apology except to your attorney, it is the judgment and sentence of this court that as to each of the three counts in the information that you be forthwith confined to the Arizona State Prison, at Florence, Arizona, and there that you be executed in the manner prescribed by law. The date of the execution, I am fixing as of December 13 of this year.

I will say to you, May God have mercy on your soul, and on mine if I have done a wrong.

And there the matter rests." (R.T. of Sentencing, Oct. 7, 1963, pp. 36 to 45)

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional Provisions involved in this case is the Sixth Amendment to the Constitution of the United States:

AMENDMENT VI: "In all criminal prosecution, the accused shall enjoy the rights to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

and, the Fourteenth Amendment to the Constitution of the United States:

AMENDMENT XIV: "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

SPECIFICATION OF ERRORS RELIED UPON

1. That the Honorable C. A. Muecke, Judge of the District Court, in and for the

District of Arizona, erred in granting the Writ of Habeas Corpus upon the ground that the Trial Judge, the Honorable Laurence T. Wren had erred in failing to give the defendant the right to confront and cross-examine witnesses in a presentence proceedings and sentence proceedings all in violation of the Sixth Amendment to the Constitution of the United States.

2. That the Honorable C. A. Muecke, Judge of the District Court, in and for the District of Arizona, erred in granting the Writ of Habeas Corpus upon the ground that the Trial Judge, The Honorable Laurence T. Wren, abused his discretion in failing to allow the defendant, Robert Alford, appellee herein, to withdrew bis plea, so as to amount to a violation of due process under the Fourteenth Amendment to the Constitution of the United States.

3. That the U. S. District Court for the

District Court, in and for the District of Arizona erred in failing to follow the Doctrine of Stare Decisis.

QUESTIONS PRESENTED

1. Whether or not defendant appellee herein, was denied the protection of the Sixth Amendment to the Constitution of the United States by not having the right to confront and cross-examine witnesses in presentence proceedings and sentence proceedings.

2. Whether or not it was a violation of due process under the Fourteenth Amendment to the Constitution of the United States for the Trial Judge's failure to allow the defendant, Robert Alford, appellee herein, to withdraw his plea.

3. Whether or not the Honorable C. A. Muecke erred in failing to follow the doctrine of Stare Decisis.

ARGUMENT

1. WHETHER OR NOT DEFENDANT, APPELLEE HEREIN, WAS DENIED THE PROTECTION OF THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BY NOT HAVING THE RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES IN A PRESENTENCE PROCEEDINGS AND SENTENCE PROCEEDINGS.

The Sixth Amendment to the Constitution of the United States reads as follows:

> AMENDMENT VI: "In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

It is very plain and evidant from reading the Sixth Amendment that this amendment applies only to trial procedure. The defendant, appellee herein, had plead guilty to the charges contained in the

information, therefore there is no issue to the appellee's right to a speedy and public trial by an impartial jury. Therefore, the Sixth Amendment has no application to presentence proceedings and sentence proceedings after a plea of guilty had been entered by the appellee herein. It would follow that he would have no right to confront and cross-examine witnesses as guaranteed by the Sixth Amendment at a presentence and sentence proceedings.

As far as the undersigned can determine, the case of Williams v. N. Y., 337 U. S. 242 (1949), is the leading case on the subject and is almost on all-fours with the question presented herein. The Trial Judge in the Williams case, supra, refused to follow the jury's recommendation of a life sentence and imposed the death sentence. The U. S. Supreme Court in an opinion delivered by Mr. Justice Black affirmed the judgment with the following

comment:

> "Tribunals passing on the guilt of the defendant always have been hedged in by strict evidentiary procedural limitations. But both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law. Out-of court affidavits have been used frequently, and of course in the smaller communities sentencing judges naturally have in mind their knowledge of the personalities and backgrounds of convicted offenders. A recent manifestation of the historical latitude allowed sentencing judges appear in Rule 32 of the Federal Rules of Criminal Procedure. That rule provides for consideration by federal judges of reports made by probation officers containing information about a convicted defendant, including such information "as may be helpful in imposing sentence of, in granting probation or in the correctional treatment of the defendant. . . ."
>
> A sentencing judge, however, is not confined to the narrow issues of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant - if not essential - to his selection of an appropriate sentence is the possession of the fullest information possible concerning the

defendant's life and characteristics. And modern concepts individualizing punishment have made i all the more necessary that the sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules and evidence properly applicable to the trial."

"Modern changes in the treatment of offenders make it more necessary now than a century ago for observance of the distinctions in the trial and sentencing processes. For indeterminate sentences and probation have resulted in an increase in the discretionary powers exercised in fixing punishments. In general, these modern changes have not resulted in making the lot of offenders harder. On the contrary a strong motivating force for the changes has been the belief that by careful study of the lives and personalities of convicted offenders many could be less severly punished and restored sooner to complete freedom and useful citizenship. This belief to a large extent has been justified."

"Under the practice of individualizing punishments, investigational techniques have been given an important role. Probation workers making reports of their investigations have not been trained to prosecute but to aid offenders. Their reports have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guess-work and inadequate information."

"To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation. We must recognize that most of the information now relied upon by the judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination. And the modern probation report drawn on information concerning every aspect of a defendant's life. The modern type and extent of this information make totally impractical it not impossible open court testimony with cross-examination. Such a procedure could endlessly delay criminal administration in a retrial of collateral issues."

"It is urged, however, that we should draw a constitutional distinction as to the procedure for obtaining information where the death sentence is imposed. We cannot accept the contention. Leaving a sentencing judge free to avail himself of out-of-court information in making such a fateful choice of sentences gives to him a broad discretionary power, one susceptible of abuse. But in considering whether a rigid constitutional barrier should be created, it must be remembered that there is possibility of abuse wherever a judge must choose between life imprisonment and death. It is conceded that no federal constitutional objection would have been possible

> if the judge here had sentenced appellant to death because appelland's trial manner impressed the judge that appellant was a bad risk for society, or if the judge had sentenced him to death giving no reason at all. We cannot say that the due-process clause renders a sentence void merely because a judge gets additional out-of-court information to assist him in the exercise of this awesome power of imposing the death sentence."

It is interesting to note that in State v. Fenton, 341 P.2d 237, 86 Ariz. 111, certiorari denied. 4 L.Ed2 115, co-counsel for appellant, Mr. Ed Morgan, attempted to have United States Supreme Court grant certiorari. Our Arizona Supreme Court in the Fenton case stated that a trial court at a presentence hearing is not bound by the strict laws of evidence applying in trials, and that the Trial Judge should have all the information possible as to the accused's past conduct. (Emphasis supplied.)

> "We are of the opinion that Rule 336, should be given a broad interpretation, and that the "circumstances"

mentioned therein do not limit the trial court to only a consideration of the mitigating or aggravating circumstances of the offense charged. State v. Owen, 73 Idaho 394, 253 P2 303."

In 1960, in the case of United States of America v. Homer Durham, 181 F. Supp. 503, Judge Holtzoff made the following statements in rendering his decision.

"It is not the practice to permit the defendant or his counsel or any one else to inspect records of presentence investigations. Such reports are treated as confidential documents. They are not public records. The reason is obvious. Such reports in order to be helpful to the Court, must of necessity contain a considerable amount of information that may be obtained, on occasion in confidence, so, too, the Probation Officer must feel free to make comments and suggestions that may prove to be of value to the Court."

"Rules of evidence are not applicable to the imposition of sentence. In fact, it has been the traditional practice, even before the system of presentence investigations was introduced, for the Court to receive information in confidence which the Court might or might not disclose to the defense, as the Court saw fit, that might bear upon the question of what sentence should be imposed. The custom of treating reports as confidential documents is

merely a continuation of the prior practice. If these reports were made public and were available to counsel as a matter of right, I am sure that their value would be much reduced, because a great deal of information now generally contained in them would not be available."

2. WHETHER OR NOT IT WAS A VIOLATION OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES FOR THE FAILURE OF THE TRIAL JUDGE TO ALLOW THE DEFENDANT, ROBERT ALFORD, APPELLEE HEREIN, TO WITHDRAW HIS PLEA.

Rule 128 of the Arizona Rules of Criminal Procedure provides as follows:

"The Court may in its discretion at any time before sentence permit a plea of guilty to be withdrawn, and, if judgment of conviction has been entered thereon, set aside such judgment, and allow a plea of not guilty, or with the consent of the county attorney, allow a plea of guilty of a lesser included offense, or of a lesser degree of the offense charged, to be substituted for the plea of guilty."

This rule has been interpreted on numerous occasions by the Supreme Court of the State of Arizona. In State v.

Valenzuela, 98 Ariz. 189, 403 P.2d 286, (1965) (The court held that a motion to withdraw a plea of not guilty is addressed to the sound discretion of the Trial Court pursuant to Rule 188 quoted herein and in the absence of clear abuse of that discretion its ruling will not be disturbed on appeal.) State v. Jones, 95 Ariz. 4, 385 P.2d 1019 (1963); State v. Alford, 98 Ariz. 124.

State v. Alford, supra, states:

> "An experienced appraisal of the available evidence frequently indicates that the chance of a successful defense is negligible. The defense attorney may then be serving his client best by advising him to plead guilty and to bargain for the most lenient treatment possible. To counsel this strategy is not to advise inadequately, even if the expectation of leniency is subsequently disappointed." (Emphasis supplied.) Comment, Assistance of Counsel, 78 Harv. L. Rev. 1434, 1441 (May 1965). And see Monroe v. Huff 79 U. S. App. D. C. 246, 145 F.2d 249 (1944)

There is nothing in this record that would indicate the defendant was induced

by the authorities to plead guilty with the expectation of lesser punishment; the record would further reflect that Alford was fully protected by the Court at the time the Court specifically examined him regarding his change of plea from not guilty to guilty and that Alford had been fully advised by a fully experienced defense counsel in that the matter had been fully discussed between counsel and Alford.

In Rainsberger v. State, 399 P.2d 129 (Nev., 1965), the Nevada Court states as follows:

> " . . . A different complexion is cast upon claimed constitutional violations and other claims or error when, as here, a defendant charged with murder, has voluntarily and with the assistance of competent court-appointed counsel, entered a plea of guilty in open court. That procedure to ascertain the degree of the crime, and fix sentence, is within the constitutional power of a legislature to provide. Hallinger v. Davis, 146 U. S. 314, 13 S. Ct. 105, 36 L. Ed. 986 (1892). The court hearing, following a plea of guilty,

is not a trial, for the issue of the defendant's guilt is no longer present (Citing cases). The constitutional safeguards pointing to a fair trial are greatly diluted in significance, for a trial to determine the ultimate issue of innocence or guilt has been waived by the plea of guilty. The presumption of innocence has ceased to exist, and the defendant stands before the court an admitted murderer, asking mercy and understanding with respect to degree and penalty. If the plea of guilty is not itself constitutionally infirm, it would appear that one who has so confessed may not rely upon the constitution to free him." . . .

See also Harris v. United States, 338 F.2d 75, 80 (9th Cir. 1964); Scott v. United States, 231 F. Supp. 360 (D. C. N. J. 1964); McKenley v. United States, 235 F. Supp. 255 (D.C.La.1964); United States v. Spada, 331 F.2d 995 (2nd Cir. 1964); Mahler v. United States, 333 F.2d 472 (10th Cir. 1964); Snipe v. United States, 343 F.2d 25 (9th Cir. 1965); United States v. Strum, 180 F.2d 413, cert. denied 339 U. S. 986 (7th Cir. 1950).

Under the Federal Rules of Criminal

Procedure, Rule 32 (C) (1), 18 U.S.C. and Rule 32 (c)(2) provides that the defendant has no legal right to withdrew his plea of guilty (Miller v. United States, 351 F.2d 598, (9th Cir., 1965).

As outlined in the Miller case, supra, there is not the slightest indication or proof from the record, that the appellee herein, did not commit the crime charged nor is there any mistake or inadvertance on appellee's part, nor fear nor fraud nor misrepresentation practiced against him.

As is shown in the statement of facts, appellee herein, first entered a plea of not guilty. It was only after a thorough investigation by appellee's defense attorney that an application for a change of plea to guilty was made and granted by the Trial Court. It was contended in Hoover v. United States, 268 F.2d 787, (10th Cir., 1959) that the

defendant did not have an opportunity to contradict or rebut statements contained in the presentence investigation and report; however, the court held that this would not violate due process and followed Williams v. People of State of New York, supra.

U. S. v. Mooney, 366 F.2d 759, (3rd Cir., 1966), contains the following language in support of the contention that this appellee was not denied his constitutional rights under the Fourteenth Amendment to the Constitution.

> "The case comes here over well travelled ground. This court has had occasion to pass upon appeals involving points similar to those now presented upon at least four occasions. See United States v. Colonna, 3 Cir., 142 F.2d 210; Gwenthe v. United States, 3 Cir., 327 F.2d 129; Eudaine v. United States, 3 Cir., 340 F.2d 391; United States v. Washington, 3 Cir., 341 F.2d 277. The applicable principles of law are well settled. A plea of guilty is a waiver of all nonjurisdictional defects and defenses and constitutes an admission of guilt. Conviction and sentence following a

plea of guilty are based solely and entirely upon the plea and not upon any evidence which may have been acquired by the prosecuting authorities. The plea in itself is a conviction upon which sentence may be imposed without further action of the court.

"The withdrawal of a plea of guilty is not a matter of right. A motion for leave to withdraw a plea of guilty and substitute a plea of not guilty is addressed to the sound discretion of the court and should be denied if the defendant knew and understood what was being done and there were not present any circumstances of force, mistake, misapprehension, fear, inadvertence or ignorance of his rights and understanding of the consequences of his plea." United States v. Colonna, supra.

3. WHETHER OR NOT THE HONORABLE C. A. BUECKE ERRED IN FAILING TO FOLLOW THE DOCTRINE OF STARE DECISIS.

The case of Williams v. People of the State of New York, supra, has been cited to this court and it is respectfully submitted that this case is to be followed in the case now pending before this Honorable Court.

It is further submitted that the

United States District Court, for the District of Arizona, erred in failing to follow this case when construing the Fourteenth Amendment to the Constitution of the United States.

The case of Williams v. People of the State of New York, supra, although not concerned with the same legal point, was recently re-affirmed in Specht v. Patterson 18 L. Ed. 2d 326.

> "If ever there should be an adherence to former decisions, it should be in cases of construction of the Constitution involving the rights of citizens as declared by that instrument." (Scown v. Czarnecki, 264 Ill. 305, 106 N. E. 276).

Constitutions do not change with the varying tides of public opinion and desire. (State ex rel Lemon v. Langlie, 45 Wash. 2d 82, 273 P.2d 464).

C O N C L U S I O N

The undersigned would like to point out to the Court that in No. 22249, Docket

L-159 Karl Hines Marten, Appellant vs. Frank A. Eyman, Appellee, Mr. W. Edward Morgan is one of the attorneys for the appellant, Marten, and in this case is one of the attorneys for the appellee Alford.

Mr. Morgan in the brief for appellant, Marten, on page 29 thereof submits exactly the same argument that I have submitted to the Court herein. He agrees fully that the law allows a Trial Judge to inquire into any type of information concerning an accused's background and character.

In reviewing the Trial Court's actions and the entire record of this case, it is obvious that there was no abuse of discretion nor any denial of any basic right to due process. It is also obvious that at the time the appellee plead guilty, both the appellee and his counsel thought it was the only chance they had to save

him from a death sentence.

If the judgment of the U. S. District Court in and for the District of Arizona is upheld it would follow conclusively that all presentence proceedings become adversary in their nature. It is respectfully submitted that this is not what the U. S. Constitution and Amendments thereto intended nor would it be beneficial to any defendant convicted of a crime.

In effect, the Honorable Judge Muecke has, carte blanche, allowed this accused to admit and plead guilty to a crime, but upon the defendant hearing of some adverse fact referred to for purposes of sentencing, this is sufficient to allow an accused to withdraw his plea and admission of guilt. It is respectfully submitted that this cannot be the law.

For the reasons stated herein the undersigned earnestly requests that the order entered by the Honorable C. A.

Muecke be vacated and reversed.

JERRY L. SMITH
Attorney for Appellant

CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JERRY L. SMITH
Attorney for Appellant

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellant was served upon me this _____day of January, 1968.

John H. Grace

JOHN H. GRACE
Attorney for Appellee